IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

EUGENE EVERETT WELCH,

Plaintiff, No. CIV S-03-0072 LKK JFM P

v.

CALIFORNIA DEPARTMENT OF CORRECTIONS, et al.,

Defendants. FINDINGS & RECOMMENDATIONS

/

Plaintiff is a state prisoner proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff claims that defendants violated his rights under the Religious Land Use and Incarcerated Persons Act (RLUIPA), 42 U.S.C. § 2000cc et seq., by requiring him to cut his hair and shave his beard pursuant to grooming regulations promulgated and implemented by the California Department of Corrections[1] in 1997. Plaintiff seeks declaratory and injunctive relief, and money damages. (See Order filed February 1, 2005, at 2.) This matter is before the court on defendants' motion for summary judgment. Defendants seek summary judgment on the ground that this action has been mooted by the promulgation this year of new grooming regulations.

SUMMARY JUDGMENT STANDARDS UNDER RULE 56

Summary judgment is appropriate when it is demonstrated that there exists "no

[1] Now known as the California Department of Corrections and Rehabilitation (CDCR).

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

> Under summary judgment practice, the moving party
>
> always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting Fed. R. Civ. P. 56(c)). "[W]here the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" Id. Indeed, summary judgment should be entered, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. See id. at 322. "[A] complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. In such a circumstance, summary judgment should be granted, "so long as whatever is before the district court demonstrates that the standard for entry of summary judgment, as set forth in Rule 56(c), is satisfied." Id. at 323.

If the moving party meets its initial responsibility, the burden then shifts to the opposing party to establish that a genuine issue as to any material fact actually does exist. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the allegations or denials of its pleadings but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. See Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 586 n.11. The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248

(1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the nonmoving party, see Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).

In the endeavor to establish the existence of a factual dispute, the opposing party need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial." T.W. Elec. Serv., 809 F.2d at 631. Thus, the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments).

In resolving the summary judgment motion, the court examines the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any. Fed. R. Civ. P. 56(c). The evidence of the opposing party is to be believed. See Anderson, 477 U.S. at 255. All reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party. See Matsushita, 475 U.S. at 587. Nevertheless, inferences are not drawn out of the air, and it is the opposing party's obligation to produce a factual predicate from which the inference may be drawn. See Richards v. Nielsen Freight Lines, 602 F. Supp. 1224, 1244-45 (E.D. Cal. 1985), aff'd, 810 F.2d 898, 902 (9th Cir. 1987). Finally, to demonstrate a genuine issue, the opposing party "must do more than simply show that there is some metaphysical doubt as to the material facts . . . . Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 475 U.S. at 587 (citation omitted).

On February 18, 2003, the court advised plaintiff of the requirements for opposing a motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. See Rand v. Rowland, 154

/////

F.3d 952, 957 (9th Cir. 1998) (en banc), cert. denied, 527 U.S. 1035 (1999), and Klingele v. Eikenberry, 849 F.2d 409 (9th Cir. 1988).

ANALYSIS

I. Undisputed Facts

At all times relevant to this action plaintiff has been a prisoner at Mule Creek State Prison (Mule Creek) in Ione, California, defendant Alameida was the director of the California Department of Corrections and Rehabilitation (CDCR), and defendant Knowles was the Warden of Mule Creek. Plaintiff is an Orthodox Christian, though he has not yet been baptized in that church. Plaintiff wears long hair and a long beard because of his religious beliefs.

In 1997, the CDCR implemented grooming regulations for male prisoners, codified at California Code of Regulations title 15, section 3062 (hereinafter "the 1997 grooming standards.") The regulations required, in relevant part, that male inmates could not grow their hair longer than three inches in length and that inmates were prohibited from wearing beards at any length. (Declaration of Timothy Lockwood, attached as Exhibit A to Defendants Separate Statement of Undisputed Material Facts in Support of Motion for Summary Judgment, filed February 3, 2006, ¶ 4.) Under these grooming standards plaintiff received multiple disciplinary actions on his record for refusing to cut his hair or beard based on his religious beliefs. Disciplinary actions included removing plaintiff from "A1-A" privilege status and placing him on "C" status, which limits inmate privileges. (See Exhibit D to Plaintiff's Objection to Defendants' Notice of Motion and Motion for Summary Judgment, filed February 23, 2006.)

On July 29, 2005, the Ninth Circuit held that the 1997 CDCR grooming policy violated RLUIPA because the policy was not the least restrictive means to achieve the state's compelling interest in maintaining prison safety and security. Warsoldier v. Woodford, 418 F.3d 989 (2005). In response to Warsoldier, on January 17, 2006, the CDCR filed emergency changes to the 1997 grooming regulations. On July 27, 2006, the new grooming regulations became final.

See California Code of Regulations, title 15, § 3062 and history thereof. In relevant part, the new grooming regulations allow inmates of either sex to grow their hair to any length, so long as the hair does not extend over the eyebrows, cover the inmate's face, or pose any risk to health or safety. (Cal. Code of Regs, title 15, § 3062(e) as amended.) The changes also allow a male inmate to grow facial hair including a beard, mustache, or sideburns, so long as the facial hair does not "extend more than one half inch in length outward from the face." (Cal. Code of Regs, title 15, § 3062(h) as amended.)

On January 31, 2006, plaintiff was removed from "C" status and placed on "A2-B" status. (Exhibit D to Plaintiff's Statement of Undisputed Facts.) On June 7, 2006, plaintiff's status was restored to "A1-A" status, effective March 31, 1999. (Exhibit F to Plaintiff's Notice to the Court (Plaintiff's July 10, 2006 Notice), filed July 10, 2006, at 2.) Additionally, all grooming-related disciplinary actions were removed from plaintiff's record, and all good time credits were restored. (Id.)

II. Defendants' Motion

Defendants seek summary judgment on the grounds that plaintiff's claims for declaratory judgment and injunctive relief are moot and that they are entitled to qualified immunity from plaintiff's claim for damages.[2]

A. Mootness

> Mootness is "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397, 100 S.Ct. 1202, 1209, 63 L.Ed.2d 479 (1980) (quoting Henry Monaghan, Constitutional Adjudication: The Who and When, 82 Yale L.J. 1363, 1384 (1973)). Article III of the United States Constitution confers jurisdiction on federal courts over "cases" and "controversies" and has been construed to prohibit advisory opinions. See SEC v. Medical Comm. for Human Rights,

[2] Defendants also contend that plaintiff's sole remedy for the loss of good-time credits is an application for a writ of habeas corpus. Plaintiff's good time credits have been restored. Accordingly, the court need not reach this argument.

> 404 U.S. 403, 407, 92 S.Ct. 577, 579, 30 L.Ed.2d 560 (1972); Muskrat v. United States, 219 U.S. 346, 362, 31 S.Ct. 250, 255, 55 L.Ed. 246 (1911). A federal court has no jurisdiction to hear a case that cannot affect the litigants' rights. Allard v. DeLorean, 884 F.2d 464, 466 (9th Cir.1989).
>
> There are, however, a few exceptions to the mootness doctrine. These include cases where the defendant's conduct constitutes a wrong "capable of repetition yet evading review," or where the defendant voluntarily ceases an allegedly illegal practice but is free to resume it at any time. See Barilla v. Ervin, 886 F.2d 1514, 1519 (9th Cir.1989); Lindquist v. Idaho State Bd. of Corrections, 776 F.2d 851, 854 (9th Cir.1985).

Native Village of Noatak v. Blatchford, 38 F.3d 1505, 1509 (9th Cir. 1994). "An action is moot where the plaintiff already has received all of the relief which would result from a favorable court ruling." Wysocki v. Sullivan, 761 F.Supp. 693, 696 (C.D.Cal. 1991) (citing DeFunis v. Odegaard, 416 U.S. 312, 319-320 (1974)).

As noted above, plaintiff seeks declaratory and injunctive relief from the continued enforcement of, as well as the consequences of his non-compliance with, the 1997 grooming standards. The undisputed evidence shows that defendants are no longer enforcing the 1997 grooming standards. The undisputed evidence also shows that plaintiff has been restored to "A1-A" status, effective March 31, 1999, all grooming related disciplinary actions have been were removed from plaintiff's record, and all good time credits have been restored. There is no other cognizable injury to plaintiff traceable to enforcement of the 1997 grooming regulations that might be remedied through this action.

In his opposition to defendants' motion for summary judgment, filed February 23, 2006, plaintiff contends that this action is not moot because the new 2006 grooming standards still require him to trim his beard to the half-inch maximum length, in violation of his religious beliefs, and plaintiff alleges that he continues to be disciplined for his facial hair length. There is no evidence in the record to support this contention.

A CDC 128-C form dated January 31, 2006 and issued after a program review conducted by a Unit Classification Committee notes that plaintiff "still violates the new

grooming standards with an excessively long beard (approx. 10 inches in length). (Ex. D to Plaintiff's Opposition to Defendants' Motion for Summary Judgment, filed February 23, 2006.) Plaintiff filed the same document again on July 10, 2006, together with other exhibits showing that plaintiff has been restored to A-1-A status, all grooming related disciplinary convictions have been set aside, and all grooming related credit loss has been restored. (Exs. E and F to document filed by plaintiff on July 10, 2006.) There is no evidence that the new grooming regulation governing beard length has been enforced against plaintiff, or that plaintiff has exhausted administrative remedies with respect to a challenge to the new grooming regulations. Cf. 42 U.S.C. § 1997e(a). Plaintiff's challenge to the 2006 grooming regulations is not yet ripe for review by this court. See Earth Island Institute v. Ruthenbeck, __ F.3d __, 2006 WL 2291168, slip op. at 6 (9th Cir. Aug. 10, 2006) (quoting Lujan v. National Wildlife Federation, 497 U.S. 871, 891 (1990) ("a regulation is ordinarily not ripe for review "'until the scope of the controversy has been reduced to more manageable proportions, and *its factual components fleshed out, by some concrete action applying the regulation* to the claimant's situation in a fashion that harms or threatens to harm him.' . . . . (emphasis added).")

For all of the foregoing reasons, plaintiff's claim for declaratory and injunctive relief on the RLUIPA claim is moot. Defendants are therefore entitled to summary judgment on this claim.

C. Money Damages

Plaintiff requested damages in the amount of $150,000 from the defendants for the extra punishments he received and the "mental stress" that he suffered as a result of enforcement of the grooming regulations. Defendants contend that they are entitled to qualified immunity from damages.

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established

/////

statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

> Consideration of qualified immunity in a Section 1983 claim raises two questions. Menotti v. City of Seattle, 409 F.3d 1113, 1152 (9th Cir.2005). Under the approach set out by Saucier v. Katz, we first must ask "whether a constitutional right would have been violated on the facts alleged." 533 U.S. 194, 200, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). "If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity." Id. at 201, 121 S.Ct. 2151.
>
> If a constitutional violation is established, we consider "whether that right was 'clearly established' such that 'it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.'" Menotti, 409 F.3d at 1152, quoting Saucier, 533 U.S. at 202, 121 S.Ct. 2151. "This inquiry is wholly objective and is undertaken in light of the specific factual circumstances of the case." San Jose Charter of the Hells Angels Motorcycle Club v. City of San Jose, 402 F.3d 962, 971 (9th Cir.), cert. denied sub nom., Decena v. San Jose Charter of Hells Angels Motorcycle Club, --- U.S. ----, 126 S.Ct. 796, 163 L.Ed.2d 627 (2005), citing Saucier, 533 U.S. at 201, 121 S.Ct. 2151. . . . "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." City of San Jose, 402 F.3d at 971, quoting Saucier, 533 U.S. at 202, 121 S.Ct. 2151. "[I]f officers of reasonable competence could disagree on this issue, immunity should be recognized." Malley, 475 U.S. at 341, 106 S.Ct. 1092.

Brittain v. Hansen, 451 F.3d 982, 988 (9th Cir. 2006).

Prior to July 2005, there was no clearly established right protecting plaintiff from enforcement of the 1997 grooming regulations. In 2004, the CDCR's 1997 hair length regulations were upheld against a First Amendment challenge, see Henderson v. Terhune, 379 F.3d 709 (9th Cir. 2004), and as early as 1990 prison regulations governing beard length had also withstood a First Amendment challenge. See Friedman v. Arizona, 912 F.2d 328 (9th Cir. 1990). Through July 2005, therefore, it would not have been clear to a reasonable correctional official that enforcement of the 1997 grooming regulations was unlawful. Moreover, the record shows that after the July 2005 Warsoldier decision, officials with the CDCR have taken all steps

necessary to restore plaintiff to the status he was in before the regulations were enacted. For these reasons, the court finds that defendants are entitled to qualified immunity from plaintiff's claim for money damages arising from defendants' enforcement of the 1997 grooming regulations.[3]

For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that defendants' February 3, 2006 motion for summary judgment be granted.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(l). Within **fourteen** days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: August 28, 2006.

UNITED STATES MAGISTRATE JUDGE

17/12;welc0072.msj

[3] Plaintiff continues to seek relief in this action for alleged damage to his television and radio that occurred during enforcement of the grooming regulations. Such relief is not available in this § 1983 action. See Hudson v. Palmer, 468 U.S. 517, 533 (1984) ("unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the Due Process Clause of the Fourteenth Amendment if a meaningful postdeprivation remedy for the loss is available.") Although plaintiff claims that his television and radio were taken away as part of enforcement of the grooming regulations, the alleged damage to those items was not authorized by any state regulation or policy. The California Legislature has provided a remedy for tort claims against public officials in the California Government Code, §§ 900, et seq. Plaintiff must seek relief for the alleged damage to his television and radio, if at all, through the state tort claim system.